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RECENT DECISIONS.

BANKRUPTCY—PREFERENCE OF BACK DEBTS—MATERIALS NECESSARY FOR MAINTENANCE OF RAILROAD. The petitioner furnished within six months of the appointment of a receiver ties necessary for the maintenance of the railroad. *Held*, that such a claim should not be paid out of the corpus of the property in the receiver's hands. *Gregg* v. *Metropolitan Trust Co.* (1905) 25 Sup. Ct. 415.

Back debts incurred necessarily in the maintenance of a railroad are allowed to be paid because otherwise the road could not obtain credit to tide itself over until a receiver was appointed. *Guarantee Trust Co.* v. *R. R. Co.* (N. Y. 1898) 31 App. Div. 511, 513. Accordingly, it has been held that labor claims, *Union Trust Co.* v. *Ill. Midland Co.* (1885) 117 U. S. 434, claim for repairs and unpaid ticket and freight balances, *Miltenberger* v. *Railway Co.* (1882) 106 U. S. 286, have been allowed to be paid out of the corpus of the property. Back debts for supplies have been allowed out of current income, *Union Trust Co.* v. *Souther* (1882) 107 U. S. 591, but the principal case restricts their payment to that fund. Such a limitation would seem arbitrary.

CONSTITUTIONAL LAW—POLICE POWER—EIGHT-HOUR LAW. A Nevada statute provided that "The period of employment of working men in smelters and in all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger." The petitioner was convicted and sentenced under this statute. *Held*, the statute was constitutional and the conviction proper. *Ex parte Kair* (Nev. 1905) 80 Pac. 463.

The section quoted and the preceding section relating to miners are identical with the provisions of the Utah statute, Session Laws of Utah, 1896, c. 72, p. 219, which were held constitutional. *Holden* v. *Hardy* (1897) 169 U. S. 366. Therefore, while the Federal Supreme Court has manifested a tendency to restrict this kind of legislation, *Lochner* v. *People* (1905) 198 U. S. 45; 5 COLUMBIA LAW REVIEW 462, it would seem certain that the decision of the principal case would fall within the distinctions drawn in *Lochner* v. *People*, supra, as to *Holden* v. *Hardy*, supra, and so be sustained.

CONSTITUTIONAL LAW—POLICE POWER—EPILEPTICS—PROHIBITION OF MARRIAGE. A statute forbade an epileptic to marry. *Held*, the statute was necessary for the preservation of the public health and so constitutional. *Gould* v. *Gould* (Conn. 1905) 61 At. 604.

The regulation of marriage is within the police power of the Legislature. Tiedeman, Limitations of Police Power § 149; Freund, Police Power § 124. Statutes have been upheld which prohibited marriages between whites and negroes, *State* v. *Gibson* (1871) 36 Ind. 389, or between persons within prescribed degrees of relationship. Freund, supra. Statutes similar to that of the principal case have been passed in Michigan, Minnesota, Kansas, and Ohio, but no cases seem to have arisen under them. In the principal case, the court places reliance on the reasonableness of the statute,—a test about as satisfactory and scientific as the Chancellor's foot.

CONSTITUTIONAL LAW—REGULATION OF PRACTICE OF MEDICINE—CHRISTIAN SCIENCE. A statute defined the practice of medicine as the recommending "for a fee . . . any treatment of whatever nature . . . for the cure of any infirmity or disease," and provided for the examining

and licensing of all practitioners. The defendant, an unlicensed Christian Science healer, was prosecuted under the statute. *Held*, the statute included Christian Science healing. *State* v. *Marble* (Ohio, 1905) 73 N. E. 1063.

Christian Science healers have been held within statutes regulating all who "profess to heal," *State* v. *Buswell* (1894) 40 Neb. 158, but not within those prescribing as to the "practice of medicine;" *State* v. *Mylod* (1898) 20 R. I. 632; yet a "medical clairvoyant" was declared within a statute requiring a certificate from those rendering "medical or surgical services," *Bibber* v. *Simpson* (1871) 59 Me. 181, and the same court recognized Christian Science healing as within the meaning of a similar statute. *Wheeler* v. *Sawyer* (Me. 1888) 15 At. 67. In the absence of statute, a clairvoyant physician was held liable for malpractice. *Nelson* v. *Harrington* (1888) 72 Wis. 591. The question, in such cases, seems to be largely one of statutory wording.

CONTRACTS—ACCEPTANCE BY MAIL AND TELEGRAPH. The defendant made the plaintiff an offer, same to be open till a certain time. The plaintiff accepted by telegram, confirming by a letter mailed on the same day. Neither of these were received, though by transmission in due course they should have reached the defendant before the expiration of the time limit. *Held*, no contract was created. *Kibler* v. *Caplis* (Mich. 1905) 103 N. W. 531.

For almost a century English courts have held that an acceptance is timed from the mailing of a properly addressed and stamped letter, *Adams* v. *Lindsell* (1818) 1 B. & Ald. 681; *Duniop* v. *Higgins* (1848) 1 H. L. C. 381, and also have held that the delivery of such a letter is not necessary for the formation of the contract. *Household Ins. Co.* v. *Grant* (1879) 4 Ex. Div. 216. The Scotch law is in accord, 1 Bell's Principles 8th ed. §78, and the same view appears universal in the United States. *Tayloe* v. *Merchants' Fire Ins. Co.* (1850) 9 How. U. S. 390; *Trevor* v. *Wood* (1867) 36 N. Y. 307, s. c. 93 Am. Dec. 511, with an elaborate note collecting the authorities; 4 COLUMBIA LAW REVIEW 541; and see *Brauer* v. *Shaw* (1897) 168 Mass. 198, in which the court approves the general doctrine and discredits the earlier case, *McCulloch* v. *Eagle Ins. Co.* (1822) 1 Pick. 278, contra. Whatever theoretical basis the decision of the principal case may have, see Langdell, Summary of Law of Contracts § 14 et seq.; *S*—— v. *F*——, *D*—— (1813) 1 Keener's Cas. Con. 149 (the court suggested none), it seems wholly without a supporting authority.

CONTRACTS—ILLEGAL BUSINESS—COLLATERAL AGREEMENT. Plaintiff, who was engaged in the illegal sale of liquor in a building owned by the defendant, furnished labor and material under contract with the husband of the owner for the repair of the building. The plaintiff filed an action to foreclose the lien for such services. *Held*, the contract was independent of the illegal business and the lien enforceable. *Doyle* v. *Franks* (Kan. 1905) 81 Pac. 211.

In England the courts at first permitted a recovery on contracts of this nature, *Faikney* v. *Reynous* (1767) 4 Burr. 2069. But this doctrine, followed with reluctance in *Petrie* v. *Hannay* (1789) 3 T. R. 418, was finally overruled in *Cannan* v. *Bryce* (1819) 3 B. & Ald. 179, which held that money knowingly lent to a party to enable him to pay a gambling debt was not recoverable; nor, it was later held, could a plaintiff recover for the use of a brougham from one whom he knew was a prostitute. *Pearce* v. *Brooks* (1866) L. R. 1 Ex. 213. But in America by the weight of authority recovery is allowed as in the early English cases, the courts holding that, if the contract to be enforced is merely collateral to the illegal business, and the plaintiff can prove his case without relying on the illegal business, a re-

covery can be permitted. *Armstrong* v. *Toler* (1826) 11 Wheat. 258; *Armstrong* v. *American Ex. Bank* (1890) 133 U. S. 433, 469; *Ware* v. *Curry* (1880) 67 Ala. 274; *Coppedge* v. *Brewing Co.* (1903) 67 Kan. 851.

COPYRIGHT—INFRINGEMENT—MUSICAL COMPOSITION. Complainant owned copyrights of certain songs of which defendants had prepared and sold perforated records for use in automatic pianos. *Held*, these records were not "copies" within the statute so as to infringe on complainant's copyrights. *White-Smith Music Pub. Co.* v. *Apollo Co.* (1905) 139 Fed. 427.

The section complainant relied on provides that the author of any musical composition "shall have the sole liberty of . . . copying . . . and vending the same." U. S. Comp. St. 1901, Sec. 4950. Under this section perforated music rolls, *Kennedy* v. *McTammany* (1888) 33 Fed. 584, and phonographic cylinders, *Stern* v. *Rosey* (1901) 17 Dist. Col. App. 562, have been held no infringements. But an English court has reached the peculiar conclusion under a similar statute (5 & 6 Vict. c. 145), that while such paper rolls do not themselves infringe, still directions as to time and expression thereon should be enjoined. *Boosey* v. *Whight* [1899] L. R. 1 Ch. 836. While the few authorities directly in point support the principal case in strictly construing the statute, still in view of the new fields opened by modern invention to such musical piracy, a contrary result would seem a better interpretation of the spirit of the copyright law. This view is supported by modern continental writers. Dunant, Du Droit des Compositeurs de Musique sur leurs Œuvres, sec. 117 et seq. with authorities cited.

CORPORATIONS—BANKS—POWERS OF CASHIER. The defendant was an accommodation indorser on a note held by the plaintiff bank. The cashier extended time on the note without the defendant's knowledge. In an action upon the note by the bank the defendant claimed a release as surety. *Held*, a cashier of a bank has no authority by virtue of his office to release a surety. *Bank of Ravenswood* v. *Wetzel* (W. Va. 1905) 50 S. E. 886.

The cashier of a bank is primarily an executive officer. *United States* v. *City Bank* (1858) 21 How. U. S. 356. By custom and usage his powers have gradually become of a more discretionary nature, varying with the jurisdictions. He may borrow for the bank, *Barnes* v. *Ontario Bank* (1859) 19 N. Y. 152, but he may not release it from debt. *Daviess Co. Sav. Assoc.* v. *Sailor* (1876) 63 Mo. 24; *Bank of Commerce* v. *Hart* (1893) 37 Neb. 197, contra *Ryan* v. *Dunlap* (1855) 17 Ill. 40. In the absence of any authority granted by charter or a custom expressly proved, his executive powers should not be enlarged to allow the discharge of a surety. *Gray* v. *Bank* (1895) 81 Md. 631. As to the acts necessary to enlarge the cashier's authority, see *Fleckner* v. *U. S. Bank* (1823) 8 Wheaton, 338.

CORPORATIONS—PERSONAL LIABILITY OF OFFICERS. The defendants were officers against which a decree had issued for using a fraudulent bottle and label. They had managed the business exclusively, had directed the unlawful acts, and had derived personal profits. *Held*, the defendants were individually liable as joint and several trespassers. *Saxlehner* v. *Eisner* (1905) 34 N. Y. L. Jour. 59.

If the corporation is solvent, the directors are not individually liable for acts of infringement done in their corporate capacity, *Mergenthaler Co.* v. *Ridder* (1895) 65 Fed. 853; *Hutter* v. *De Q. Co.* (1904) 128 Fed. 283; *Glucose Co.* v. *St. Louis Co.* (1905) 135 Fed. 540, though a line of cases, discredited by those cited above, hold such officers proper parties for discovery and injunction. *Armstrong* v. *Savannah Soap Works* (1892) 53 Fed. 124; *National Cash Register Co.* v. *Leland* (1899) 94 Fed. 502. The principal case, however, while recognizing

the entity theory, imposes the same individual liability on officers hiding behind a sham corporation for personal benefit that is imposed on mere private parties, *Fishel* v. *Lueckel* (1892) 53 Fed. 499, and comes within the principle, as to guilty participation by officers, announced in *Peters* v. *Union Biscuit Co.* (1903) 125 Fed. 601 (reversed in 128 Fed. 609, on another question), and within the exceptions to the rule of non-liability for purely corporate acts. The doctrine of an agent's liability for trespasses committed for the principal, analagous to the doubtful liability of an agent of a corporation, *Graham* v. *Earl* (1897) 92 Fed. 155, would seem inapplicable except where, as in the principal case, the act was also the personal act of the defendant.

CORPORATIONS—STATUTORY LIABILITY OF SHAREHOLDER—STATUTE OF LIMITATIONS. Defendant set up the statute of limitations in an action by the receiver of a national bank to enforce the statutory liability of a shareholder. *Held*, such liability cannot be regarded as coming under the provisions of the statute for an "action upon a contract or liability, express or implied, which is not in writing and does not arise out of any written instrument." *McClaine* v. *Rankin* (1905) 25 Sup. Ct. 410. See NOTES, p. 606

CRIMINAL LAW—RETROSPECTIVE LEGISLATION. The prisoner was convicted for carnally knowing a girl under sixteen. *Held*, that a statute passed before the running of the previous statutory limitation and extending the time for prosecuting an action, related to procedure, and, though retrospective, was valid. *Rex* v. *Dharma* [1905] 2 K. B. 335.

In England statutes relating to procedure are retroactive, *Wright* v. *Hale* (1860) 6 H. & N., 226, and statutes changing the time of limitations are regarded as relating to procedure. *Pardo* v. *Bingham* (1869) L. R. 4 Ch. App. 735. In the United States the ex post facto provisions of the constitutions must be considered. Cooley, Const. Limit, 7th ed. 381. The only American case found in point is in line with the principal case. *Com.* v. *Duffy* (1880) 96 Pa. 506. The principle would seem to be the same as that applied in the cases which allow a prosecution for an offence committed under a repealed statute after the repealing statute has been repealed. *Com.* v. *Getchell* (Mass. 1835) 16 Pick. 452; Bishop, Stat. Crimes § 180; McClain, Crim. Law § 102. It has been held that a statute authorizing the prosecution of a crime previously committed and already barred under a pre-existing statute of limitations was unconstitutional. *Moore* v. *State* (1881) 43 N. J. L. 203. But the propriety of the decision has been questioned. Bishop, supra § 266.

EQUITY—BILL TO REMOVE CLOUD ON TITLE—REQUISITES THEREOF. The plaintiff claimed title to certain premises under a tax deed which was, by statute, conclusive evidence of absolute title in the grantee. The defendant had a mortgage on the premises before the tax sale but because of not having complied with certain statutory requirements was debarred from enforcing it against the grantee at the tax sale. *Held*, that a bill to remove cloud on title was improperly refused in the lower court. *Flint Land Co.* v. *Fochtman* (Mich. 1905) 103 N. W. 813. See NOTES, p. 609.

EQUITY—INJUNCTION—CONTINUING TRESPASS UNDER COLOR OF POLICE POWER. A number of policemen, suspecting gambling was going on inside a club house, broke into and virtually wrecked the same, without having demanded entrance and without a warrant. The plaintiff individually and as president of the club sought to have the defendant as Commissioner of Police enjoined from a continuous trespass of which this formed part. The defendant justified his act under § 315 of the New York Charter. *Held*,

this section of the charter gives the police no power to enter houses without warrant and the injunction would be granted. *Phelps* v. *McAdoo* (1905) 94 N.Y. Supp. 265. See NOTES, p. 611.

EQUITY—SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY STOCK. Defendant agreed to convey to plaintiff certain shares of stock. The stock was not listed on any exchange nor purchasable in the market. The defendant refused to convey. *Held*, as plaintiff had an adequate remedy at law, specific performance would not be granted. *Butler* v. *Wright* (1905) 103 App. Div. 463.

Specific performance of a contract to convey stock will generally be decreed when its value cannot readily be ascertained or where it is not procurable on the market. *New England Trust Co.* v. *Abbott* (1894) 162 Mass. 148; *Northern Central Ry. Co.* v. *Walworth* (1899) 193 Pa. St. 207; *Krouse* v. *Woodward* (1895) 110 Cal. 638. It is even assumed that if the stock cannot be obtained elsewhere, the particular stock is wanted in specie. *Marten* v. *Ray* (1894) 18 R. I. 672. The position of the court is upheld in *Moulton* v. *Warren Manf'g Co.* (1900) 81 Minn. 259, but on the whole precedent would seem to call for specific performance as a more adequate remedy.

EVIDENCE—RES GESTÆ—SPONTANEOUS EXCLAMATION OF BYSTANDER. The plaintiff sued for damages for injuries received in a collision, and offered in evidence the exclamation of a bystander, made while the defendants' act continued. *Held*, the exclamation was no part of the res gestæ, and therefore inadmissible. *Kuperschmidt* v. *Met. St. Ry. Co.* (1905) 94 N. Y. Supp 17.

Statements made by one participating in an act, and explanatory of the act, are admissible when they logically form part of the act. Greenleaf, 16th ed. § 108; Thayer, 15 Am. Law Rev. 78, 79. Statements made by one in the moment of suffering injury, *Com.* v. *Hackett.* (Mass. 1861) 2 Allen, 136, or by one inflicting injury, immediately after the occurrence, *Casey* v. *N. Y. C. R. R.* (1879) 78 N. Y. 518 (in 95 N. Y. 284), are not strictly part of the act done. Greenleaf § 162 f. Although such statements have been illogically denominated part of the res gestæ, *Ins. Co.* v. *Mossly* (1869) 8 Wall. 397, a more satisfactory theory of their admissibility is on the ground of trustworthiness. *State* v. *Wagner* (1873) 61 Me. 178, 195; *McLeod* v. *Ginther's Adm.* (1882) 80 Ky. 399, 405. On this ground the admissibility extends, in most jurisdictions, to spontaneous exclamations of bystanders. Thayer 15 Am. Law Rev. 94; Greenleaf § 162 g. and cases cited. Apparently through a confusion of the phrase res gestæ, and the real reason for admissibility, a few courts admit spontaneous exclamations only when made by one participating in the act. *Stroud* v. *Com.* (Ky. 1892) 19 S. W. 976; *Flynn* v. *State* (1884) 43 Ark. 289.

INTERNATIONAL LAW—OBLIGATIONS OF CONQUEROR. Gold of the suppliants was seized by the South African Republic, and a receipt issued before the war with Great Britain. The plaintiff sues the Crown to recover the amount. *Held*, it is not a principle of international law that a conquering country assumes the obligations of the conquered. *West Rand Central Gold Mining Co.* v. *Rex* [1905] L. R. 2 K. B. 391.

It is laid down as a general proposition that a conqueror succeeds to the rights and obligations of the conquered. Hall Int. Law § 205. And the principle that a change in the sovereignty does not affect landed property is well settled. *U. S.* v. *Percheman* (1833) 7 Pet. 51; *Mitchel* v. *U. S.* (1835) 9 Pet. 711. But to be consistent with the theory that a conqueror takes on his conditions, Grotius, De Jure Belli ac Pacis Bk. III, c. VIII, § 4; memorandum 2 Peere Williams 75; *Campbell* v. *Hall* (1774) 1 Cowper 204, 209, the doctrine of succession to obligations of conquered, has been

limited to private property. *Cook* v. *Sprigg* [1899] L. R. A. C. 272. And while in several instances nations have assumed the debts of the conquered, as for example Italy in the case of the Papal debt, Hall Int. Law 205, n, the English courts refuse to compel such assumption.

LIBEL—EXCESS OF PRIVILEGE—MALICE. A railroad company posted a bulletin in its offices implying that plaintiff, a discharged conductor, had converted certain tickets and requiring that same should be refused by passenger conductors. Defendant's offices were open to the public and all employees were required to examine such bulletins. *Held*, defendant had exceeded its privilege and, under proper instructions, this should have been evidence to the jury of malice. *Sheftall* v. *Cent. of Ga. Ry. Co.* (1905) 51 S. E. 646. See NOTES, p. 610.

PLEADING AND PRACTICE—ACTION OF DECEIT—ALLEGATION OF ACTUAL VALUE OF LAND PURCHASED. A declaration in deceit alleged that the plaintiff, relying on defendant's fraudulent representations as to title, purchased from him for a lump sum a ranch represented to contain forty-three sections, but actually containing only thirty-two. No allegation as to the value of the thirty-two sections was made. *Held*, on appeal from a motion dismissing the complaint, after demurrer sustained, the declaration states a cause of action. *Walker* v. *Walbridge* (1905) 136 Fed. 19.

The sufficiency of the declaration depends on the rule of damages adopted as a measure of recovery. The case holds the recovery should be a proportional part of the purchase price. By the weight of authority, this rule applies in actions for breach of covenant. *Morris* v. *Phelps* (N. Y. 1809) 5 Johns. 49; 1 Sedgwick, Damages 7th ed. 339. Under this rule, the value of the part retained is clearly immaterial, and the declaration would be sufficient. But in actions of deceit, the recovery should be the difference between the actual value and the value if the land were as represented, *Sigafus* v. *Porter* (1900) 179 U. S. 116; Sutherland, Damages § 1172; contra, *Parker* v. *Walker* (S. C. 1859) Rich. L. 138, of which latter value the purchase price has been held the measure. *Monell* v. *Colden* (N. Y. 1816) 13 Johns. 395. By this rule the allegation of actual value was essential, and the declaration, not containing it, was demurrable.

PLEADING AND PRACTICE—INSTRUCTIONS TO JURY—ERROR, WHEN CURED. In an action for injuries on defendant's elevated road, the court charged that if the plaintiff was injured by a voluntary rush of people, desiring to board the car, the defendant was not responsible. The plaintiff excepted to and requested the charge "in view of that portion, that if, though forced by other passengers on the car, if he boarded the car in safety, and thereafter the guard pushed other people in, and caused this accident, the company is liable." The court said, "Certainly, I charge that." *Held*, this was a modification of the previous portion, and counsel's acquiescence made the charge as delivered the law of the case. *Viemeister* v. *Brooklyn Heights R. Co.* (1905) 182 N. Y. 307.

The request for a ruling, if granted, waives any previous exception inconsistent therewith. *Lahr* v. *Elevated R. R. Co.* (1887) 104 N. Y. 268. But this rule would not apply where, as in the principal case, the instruction excepted to and that requested are predicated upon two different sets of facts. The case seems in conflict with the universal rule that to cure an error in a charge the withdrawal must be in such explicit terms as to preclude the inference that the jury might have been influenced thereby. *Wenning* v. *Teeple* 1895 (144) Ind. 189; *Eldridge* v. *Hawley* (1874) 115 Mass. 410; *Chapman* v. *Railroad Co.* (1874) 55 N. Y. 579.

PLEADING AND PRACTICE—JOINDER OF CAUSES OF ACTION. The complaint set out three causes of action based on the same transaction. First, an express contract of sale; second, a contract implied in fact for

goods sold and delivered; third, a conversion, waiver of tort, and a promise implied in law. *Held*, the causes were properly joined. *Francke* v. *Taussig Co.* (1905) 33 N. Y. L. Jour. 1575.

The causes are improperly joined under the English common law, which denied a recovery in quasi contract where an express contract existed. *Ferguson* v. *Carrington* (1829) 9 B. & C. 59. The introduction of the second and third causes is theoretically wrong under the reformed procedure. The pleader attempts to use the common counts, which were based on fictions and were allowed in aid of a party who must set out his facts according to their legal effect. As the codes provide for a simple statement of the actual facts, the common counts are unnecessary, and their use is illogical. *Hammer* v. *Downing* (1901) 39 Oregon 504; *Penn. etc. Ins. Co.* v. *Conoughy* (1898) 54 Neb. 123; *Minor* v. *Baldridge* (1898) 123 Cal. 187; Pomeroy, Code Remedies, 3rd ed. § 544. However, the New York courts have held to the contrary on both points, *Roth* v. *Palmer* (1858) 27 Barb. 652; *Allen* v. *Patterson* (1852) 7 N. Y. 476; *Hosley* v. *Black* (1863) 28 N. Y. 438, and in the code states generally, the courts, influenced by the old system and not conceiving the true nature of the code complaint, have permitted the use of the common counts. Pomeroy, supra, § 542 and authorities cited. But the joining of the third count seems an extension even under the New York rules.

PLEADING AND PRACTICE—NEW TRIALS—CONCLUSIVENESS OF SUCCESSIVE VERDICTS. The defendant moved to set aside a verdict as against the weight of evidence, the same case having been twice before sent down after verdicts for the plaintiff on substantially the same conflicting evidence. *Held*, under such circumstances the court could not interfere, although it thought the verdict was against the weight of evidence. *Lacs* v. *Edward's Breweries* (1905) 95 N. Y. Supp. 25.

While in reviewing the first verdict of a jury, courts ordinarily exercise their discretion more or less freely, they consider this discretion restricted by successive verdicts for the same party. *Slocum* v. *Knosby* (1890) 80 Ia. 368; *Eastman* v. *Wight* (1854) 4 Ohio St. 156; *Todd* v. *Demeree* (1890) 15 Colo. 88. But it would seem that logically they should not by any number of successive erroneous verdicts be deprived of their original acknowledged right to set aside a verdict. *Burnham* v. *Railroad* (1894) 18 R. I. 494; *McFarland* v. *Washburn* (1887) 26 Ill. App. 355; *Williams* v. *Railroad Co.* (1901) 66 App. Div. 336; *Clark* v. *Jenkins* (1894) 162 Mass. 397. Although in the principal case the court may on the facts be well within its discretion, its statement of the rule governing it is far too sweeping.

REAL PROPERTY—EASEMENTS—DAMAGES FOR INJURY. Defendant railroad entered upon a street and occupied it adversely for twenty years. During this time plaintiff acquired abutting property but made no objections to the maintenance of the railroad until ten years later. He seeks an injunction and damages. *Held*, he is not entitled to either relief. *Kakeldy* v. *C. P. S. R. Co.* (Wash. 1905) 80 Pac. 205.

The right to compensation in such a case is a personal one accruing to the one owning the abutting property at the time of the entry, *King* v. *The Mayor* (1886) 102 N. Y. 171, and does not run to a vendee of the land. *McFadden* v. *Johnson* (1872) 72 Pa. St. 335. If changes be made in the road after the vendee acquires his property he is entitled to compensation for the additional burden, *C. & A. R. R. Co.* v. *Henneberry* (1894) 153 Ill. 354, but no more. *I. B. & W. R. Co.* v. *McBroom* (1887) 114 Ind. 198. The right to injunctive relief may be lost by one who in silence witnesses the construction and maintenance of a railroad. *Roberts* v. *N. P. R. Co.* (1894) 158 U. S. 1. Thereafter the only available relief is by damages. *Pettibone* v. *L. C. & M. R. Co.* (1861) 14 Wis. 479. In the principle case there was ample evidence to raise such an estoppel.

REAL PROPERTY—INDIAN TITLE—RESTRICTION ON ALIENATION. Under a treaty, the government issued to an Indian a patent, granting land to him and his heirs, and restricting alienation for a period longer than two years. The grantee devised the land by will. The heir now claims against the devisee. *Held*, judgment for the heir, the grantee having had a mere right of occupancy, undevisable. *Jackson* v. *Thompson* (Wash. 1905) 80 Pac. 454.

Courts have often been unwilling to discuss the exact nature of an Indian's interest in a governmental grant, but governmental grants under individual treaties have been declared to be fee simples absolute, *Jones* v. *Meehan* (1899) 175 U. S. 1, defeasible fees, *Wells* v. *Thompson* (1848) 13 Ala. 793, conditional fees (semble), *Kennedy* v. *M'Cartney* (Ala. 1836) 4 Port. 141, or an estate unknown to the common law. *Smythe* v. *Henry* (1890) 41 Fed. 705. The courts recognize that the government may, within constitutional limitations, create any estate it wishes, *Kennedy* v. *M'Cartney* supra, and the question thus becomes one of interpretation of Indian treaties and grants.

REAL PROPERTY—ADVERSE POSSESSION—INTENT. The defendants entered upon the plaintiffs' lands, believing they were public lands subject to entry, with the purpose of acquiring title thereto, and possessed the same for more than ten years. *Held*, the facts did not prove adverse possession, because the entry was not under a claim of right made for the purpose of dispossessing the owner. *Yesler Estate* v. *Holmes* (Wash 1905) 80 Pac. 851. See NOTES, p. 605.

REAL PROPERTY—PRESCRIPTION BY THE PUBLIC. The plaintiff filed an action to restrain the county commissioners from opening up a public highway. *Held*, while a highway could be acquired by prescription, the user of unoccupied wild lands, without the knowledge of the owner, would not found such a right. *Watson* v. *Board* (Wash. 1905) 80 Pac. 201. See NOTES, p. 608.

TORTS—NUISANCE PER SE—CONTRIBUTORY ACTS OF PLAINTIFF. In an action for damages resulting from defendant's maintenance of a nuisance which polluted the plaintiff's well, there was evidence of pollution by the plaintiff also. *Held*, error to charge that such pollution by the plaintiff would not defeat his right of recovery. *Holbrook* v. *Griffis* (Ia. 1905) 103 N. W. 479.

As in an action for nuisance per se, the negligence of the defendant is immaterial, *Rylands* v. *Fletcher* (1865) L. R. 1 Ex. 265; *Heeg* v. *Licht* (1880) 80 N. Y. 579; *McAndrews* v. *Collerd* (1880) 42 N. J. L. 189; *Rudder* v. *Koopman* (1896) 116 Ala. 332; *Berger* v. *Gaslight Co.* (1895) 60 Minn. 296, the doctrine of contributory negligence does not apply. *Woolf* v. *Chalker* (1862) 31 Conn. 121; *Rudolf* v. *Town of Bloomfield* (1889) 77 Ia. 50. In the last case the court properly allowed a nuisance by the plaintiff to be considered, but only in determining the amount of the defendant's liability. The principal case seems wholly inconsistent with this view.

TORTS—WRONGFUL DEATH STATUTE—NON-RESIDENT ALIEN BENEFICIARIES. The plaintiff brought action under the New York wrongful death statute for the benefit of the widow and next of kin who were all non-resident aliens. *Held*, the action might be maintained. *Alfson* v. *Bush Company* (1905) 34 N. Y. L. Jour. 18.

Some courts have reached the opposite result on the theory that presumptively all statutes are for residents only. *Adam* v. *Steamship Co.* [1898] 2 Q. B. 430; *Deni* v. *Railroad Co.* (1897) 181 Pa. 525. There appears to be no English authority for this position, *Davidsson* v. *Hill* [1901] 2 K. B. 606, and the Pennsylvania case relies on decisions which restrict statutes to

residents because otherwise the privileges granted would be abused. *Collom's Appeal* (Pa. 1882) 2 Penny. 130; *Bacon* v. *Horne* (1888) 123 Pa. 452. See Maxwell, Interpretation of Statutes, 171. As these wrongful death statutes were intended to do away with the common law rule that the tort dies with the person, and as the person, had he lived, might have brought the action, the interpretation adopted in the principal case seems sound. For a collection of the authorities, see *Bonthron* v. *Phœnix Light and Fuel Co.* (Ariz. 1903) 71 Pac. 941.

TRUSTS—CHARITY—SCOTTISH LAW. A testator directed his trustees to divide a portion of his estate among such "charitable or religious institutions and societies" as they might select. *Held*, the bequest was void for uncertainty. *Grimond* (*or Macintyre*) v. *Grimond* [1905] A. C. 124.

It is a general rule of both the civil and the English law that a trust which has no definite beneficiaries will not be enforced, Domat, Civ. Law, Bk. IV, tit. 2. § 2, xi, xii; *Morice* v. *Bishop of Durham* (1805) 10 Ves. Jr. 522. If, however, the trust is for charity such indefiniteness does not invalidate it, Domat, Civ. Law, Bk. IV, tit. 2, § 6, v. *Blair* v. *Duncan* [1902] A. C. 37: *Morice* v. *Bishop of Durham*, supra. As to what constitutes a charity the only difference seems to be that in English law a charity is anything within the purposes enumerated in the preamble of 43 Eliz. c. 4, *Jackson* v. *Phillips* (1867) 14 Allen 539, 550–556, but there is no such technical test in the civil law, Domat, Civ. Law, Bk. IV, tit. 2, § 6, i; *Blair* v. *Duncan*, supra, per Lord Davey, 43. Compare Lord Watson's opinion in *Pemsel's Case* [1891] A. C. 531, 560–562. The trustees not being limited to "charities", or to a definite class, *Wright* v. *Atkyns* (1823) 1 Turn. & Rus. 143, the decision is in accord with the above principles.